LAZY VD LAND AND LIVESTOCK CO.

IBLA 86-1062 Decided April 19, 1989

Appeal from a decision of the Little Snake Resource Area, Bureau of Land Management, concerning ownership of certain subsurface materials of land subject to a Stock-Raising Homestead Act patent.

Affirmed.

1. Rules of Practice: Appeals: Standing to Appeal--Stock-Raising Homesteads--Trespass: Generally

   The surface owner of land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. | 291 (1970), has standing to appeal a decision of the Bureau of Land Management concerning the ownership of certain subsurface materials, even though the surface owner was not served with a copy of the notice of trespass initiating the action, when the decision holds that the subsurface materials are owned by the United States, rather than by the surface owner.

2. Administrative Procedure: Hearings--Rules of Practice: Appeals: Hearings

   When an appellant fails to submit any evidence tending to contradict the evidence presented by the Bureau of Land Management, there is no factual dispute and the Board will reject appellant's request for an eviden-tiary hearing pursuant to 43 CFR 4.415.

APPEARANCES: Rebecca Love Kourlis, Esq., Craig, Colorado, for appellant; Lyle K. Rising, Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE LYNN

Lazy VD Land and Livestock Company (Lazy VD) appeals a notice of trespass dated December 12, 1985, and issued by the Little Snake Resource Area, Bureau of Land Management (BLM), Craig, Colorado, to Amoco Production Company (Amoco).

Lazy VD is the surface owner of land situated at SW^ SW^ sec. 21, T. 11 N., R. 102 W., sixth principal meridian, Moffat County, Colorado, which was patented under the Stock-Raising Homestead Act of 1916 (SRHA), 39 Stat. 862, 43 U.S.C. | 291 (1970), (repealed by section 702 of the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2787), Patent No. 1110716. On October 28, 1985, Lazy VD entered into a right-of-way agreement with Amoco, permitting Amoco to construct an access road across Lazy VD's land to reach its Cold Spring No. 1 oil and gas drilling site. Amoco agreed to purchase from Lazy VD "all dirt necessary for the construction of the access road * * * at a cost of $1.25 per cubic yard" (Agreement at 3).

On December 17, 1985, BLM inspected Amoco's Cold Spring No. 1 site. During the inspection, the inspector noticed a pit on a hilltop approximately 50 yards from the access road. The inspector examined the pit and asked Amoco employees about it. His December 17, 1985, inspection report states that Amoco admitted agreeing to pay Lazy VD $1.25 per cubic yard for the material and removing it, but believed the material was fill and not part of the mineral estate. A more detailed inspection report, which was prepared on March 3, 1985, after the filing of the present appeal, noted that

> [a]n area approx. 150 yards by 75 yards had been stripped of topsoil and vegetation. The large area was cleared to apparently allow for eventual reclamation, vehicle loading of material, vehicle turnaround, testing for suitable gravel materials, and the pit itself. The topsoil was neatly stockpiled in a berm along the south edge of the stripped area. This topsoil stockpile was approx. 5 yards wide by 100 yards long and 1 yard in depth. The topsoil stockpile was clearly placed outside the working area and was undisturbed by gravel extraction activity. Stripping and stockpiling of topsoil was done with heavy equipment, probably what is referred to as a scraper.
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> Some piles of subsoil or reject materials were stockpiled on the far east edge of the stripped area. The actual pit or excavated area was in the middle third of the stripped area. The excavated pit was approx. 10 feet deep or bottom was 10 feet below natural ground surface with stockpiles of sand and gravel materials along the east and west edge of the pit. The western third of the stripped area also showed evidence of test excavations and dozer work to open up the sand and gravel layer. Again piles of subsoil or reject materials were also present along the north and west perimeter of the stripped area.
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> No work was taking place on the date the site was inspected. However, the dirt contractor was grading the access road to the well site and carrying out snow removal along the right-of-way. I stopped the equipment operator to question him about the pit. He said material was sold to Amoco by rancher and they used it to surface the access road and oil and gas well pad. He also said

they were done removing material for now since road and well pad were completed.

On December 18, 1985, BLM issued a trespass notice to Amoco for the unauthorized removal and use of 8,280 cubic yards of mineral materials (sand and gravel road base material) in violation of sections 302 and 304(b) of FLPMA, 43 U.S.C. || 1732, 1734(b) (1982), and 43 CFR 3603.1. The notice stated: "If you have evidence or information which tends to show you are not a trespasser as we have alleged, you are allowed 14 days from receipt of this notice to present such evidence or information at the Bureau of Land Management office shown on the front of this form" (Notice at 2).

Although from the record it appears that the trespass notice was served only on Amoco, on January 6, 1986, representatives of BLM, Amoco, and Lazy VD met to discuss the trespass action. According to BLM notes from that meeting, Lazy VD and Amoco contended the material removed was an earthen, or fill, material, not sand and gravel, and, therefore, was not part of the mineral estate, but rather was part of the surface estate and owned by Lazy VD. BLM argued that the material removed was sand and gravel. However, BLM stated it would do further research and testing to determine whether the material removed constituted sand and gravel.

BLM prepared an appraisal report, dated January 27, 1986, which found the materials removed were sand and gravel with a market value of $1 per cubic yard, for a total value of $8,280. On January 30, 1986, BLM billed Amoco for $8,280. In that letter BLM informed Amoco that any additional materials needed could be purchased from the United States under contract pursuant to 43 CFR 3610.1-1. This letter set forth a right of appeal pursuant to 43 CFR Part 4, Subpart E. A copy of the letter was sent to counsel for Lazy VD.

Amoco paid BLM $8,280 on February 24, 1986.

By letter dated February 10, 1986, BLM advised Lazy VD of the status of the land covered by its SRHA patent:

> In light of the recent mineral material trespass against Amoco Production Company, on lands which you own the surface estate pursuant to the [Stock-Raising Homestead Act of 1916], we are notifying you that all the minerals are reserved under the referenced Act including all substances that are inorganic, that can be removed from the soil, (soil being defined as organic) and that can be used for commercial purposes. Under the Stock- Raising Homestead Act, Congress reserved all mineral estate for disposition by the United States. This intent was clearly affirmed by the Supreme Court in Watt vs. Western Nuclear Inc., 103 S. Ct. 2218 (June 6, 1983).

On February 28, 1986, Lazy VD filed a notice of appeal, statement of reasons, and request for hearing regarding the trespass notice. Lazy VD argued: (1) the material removed was not sand and gravel; (2) even if

the material were a mineral under the SRHA, BLM erred in calculating the assessment of damages; and (3) it was entitled to a fact-finding hearing before an Administrative Law Judge to determine the character of the material removed from the area.

BLM, on March 27, 1986, filed a motion to dismiss and motion for summary judgment, contending: (1) appellant was not a party to the decision, and therefore, lacked standing to appeal; (2) the appeal was not timely filed; (3) the material was sand and gravel and the appraisal accurately reflected its fair market value; and (4) a hearing should not be granted because Lazy VD failed to rebut its evidence that the material removed was sand and gravel. Lazy VD opposed BLM's motions in a document filed on April 21, 1986.

The first issue is whether Lazy VD has standing to bring this appeal. Lazy VD argues that "[t]he action of the BLM in declaring a trespass and the concomitant payment by Amoco to the BLM INSTEAD OF to Appellant directly and adversely affected Appellant" (Appellant's Opposition to Motion to Dismiss at 2; emphasis in original).

[1] Under 43 CFR 4.410(a), "Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have a right to appeal to the Board." A party to a case who has a cognizable interest which has been adversely affected will be considered to have standing under 43 CFR 4.410(a). Mark S. Altman, 93 IBLA 265 (1986).

By virtue of the trespass notice, BLM asserted that the United States owned the material Lazy VD claimed to own. Although BLM contends that Lazy VD was not technically a party to the trespass notice, Lazy VD was clearly the real-party-in-interest as to the issue of property ownership. Lazy VD was adversely affected by the determination that the United States owned the material removed and, therefore, has standing to challenge that decision.

However, Lazy VD was not affected by the determination of the value of the material removed. BLM's determination of the value of that material was paid by Amoco. If, as a result of this appeal, Lazy VD were determined to be the owner of the material removed, the price it would receive for that material would be based on its contract with Amoco, not the BLM appraisal. Accordingly, Lazy VD has no legally cognizable interest in the calculation of damages and has no standing to challenge the calculation.

The next question is whether the appeal was timely filed. BLM argues that the appeal should have been filed within 30 days of the date of the December 18, 1985, trespass notice, even though that notice was sent only
to Amoco. We agree with BLM that Lazy VD had actual notice of the issuance of the trespass notice and participated in the discussions concerning the alleged trespass, and accordingly must be deemed to have had notice despite BLM's failure to serve the trespass notice on it. See e.g., Stephen J. Stagnaro, 107 IBLA 323 (1989). We also agree with Lazy VD, however, that the trespass notice was not a final appealable decision, but rather an interlocutory determination subject to further review and consideration

by the local BLM office. The first appealable decision was the January 30, 1986, finding that the material was sand and gravel. Lazy VD's February 28, 1986, notice of appeal was timely filed.

[2] Lazy VD argues that because the facts are at issue, the Board should refer the case for an evidentiary hearing, stating that it would
bear the burden of showing the BLM determination was erroneous. 1/ An evidentiary hearing is necessary under 43 CFR 4.415 where there is a material issue of fact requiring resolution through the introduction of testimony and other evidence. In the absence of such an issue, no hearing is required. Kernco Drilling Co., 71 IBLA 53 (1983).

Lazy VD challenged BLM's assertion that the material removed was sand and gravel. However, it offered no evidence rebutting BLM's evidence, but rather merely asserted that the material was not sand and gravel. Absent some evidence other than Lazy VD's unsupported allegation, we decline to order an evidentiary hearing under 43 CFR 4.415.

We, therefore, reach the substance of Lazy VD's argument that the material removed was not sand and gravel. According to the Glossary of Geology (Robert L. Bates and Julia A. Jackson 2d. ed. (1980)) at page 273, "gravel" is

> (a) An unconsolidated, natural accumulation of rounded rock fragments resulting from erosion, consisting predominantly of particles larger than sand (diameter greater than 2 mm, or 1/12 in.), such as boulders, cobbles, pebbles, granules, or any combination of these fragments; the unconsolidated equivalent of conglomerate. * * * (b) A popularly used term for a loose accumulation of rock fragments, such as a detrital sediment associated esp. with streams or beaches, composed predominantly of more or less rounded pebbles and small stones, and mixed with sand that may compose 50-70% of the total mass. (c) A soil term for rock or mineral particles having a diameter in the range of 2-20 mm * * * in this usage, the term is equivalent to pebbles * * *. In the U.S., the term is used for rounded rock or mineral soil particles having a diameter in the range of 2-75 mm (1/6 to 3 in.); formerly the term applied to fragments having diameters ranging from 1 to 2 mm. See also: fine gravel. (d) An engineering term for rounded fragments having a diameter in the range of 4.76 mm (retained on U.S.

1/ On Mar. 18, 1986, Lazy VD filed a Freedom of Information Act (FOIA) request with BLM for information regarding BLM assessments in similar cases in Colorado, and states that "[t]he information generated from that FOIA request will indicate to Appellant whether or not the amount assessed for the materials taken from Appellant's properties was in line with other assessments of a similar nature" (Appellant's Opposition to Motion to Dismiss at 4). Lazy VD has not filed any additional statement relating to the FOIA request. In view of our prior holding that Lazy VD does not have standing to contest the amount of the valuation of the material removed, any response based on this FOIA request would be irrelevant.

standard sieve no.4) to 76 mm (3 in). See also: fine gravel; coarse gravel. (e) A stratum of gravel. (f) An obsolete term for sand. (g) volcanic gravel.

BLM submitted evidence that samples of the type of material removed were taken on January 10, 1986. The results of tests of that material showed the following composition: 25.69 percent cobbles (rocks larger than 1.5 inches) [38.10 mm]; 2/ 20.62 percent pebbles (rocks 1.5 to .18 inch) [38.10 to 4.572 mm]; 4.87 percent granules (rocks .18 to .075 inch) [4.572 to 1.905 mm]; 45.94 percent sand (rocks .075 to .003 inch) [1.905 to .0762 mm]; and 2.96 percent silt and clay. Applying the definitions of gravel, it is apparent that at least 71.43 percent of the material tested was sand and gravel (excluding silt and clay and cobbles). Therefore,
we conclude BLM has shown that the material removed was sand and gravel.
We have previously held that commercial deposits of sand and gravel are reserved under the mineral reservation of the SRHA. Browne-Tankersley Trust, 76 IBLA 48 (1983); after remand, United States v. Browne-Tankersley Trust, 98 IBLA 325 (1987), appeal filed, Browne-Tankersley Trust v. Hodel, Civ. No. 88-317, (D. Ariz., Apr. 28, 1988).

Even if the material was determined to be sand and gravel, Lazy VD contends that BLM erred in construing Watt v. Western Nuclear, 462 U.S. 36 (1983), to hold that anything inorganic is mineral. This argument concerns BLM's statement in its February 10, 1986, letter to Lazy VD that "we are notifying you that all the minerals are reserved under the referenced [Stock-Raising Homestead] Act including all substances that are inorganic, that can be removed from the soil, (soil being defined as organic) and that can be used for commercial purposes."

As we discussed in Browne-Tankersley Trust, 76 IBLA at 49-50, Western Nuclear, Inc. defines the mineral reservation under the SRHA as including "substances that are mineral in character (i.e., that are inorganic), that can be removed from the soil, that can be used for commercial purposes, and that there is no reason to suppose were intended to be included in the surface estate." 462 U.S. at 53. The Supreme Court, in determining that gravel was within that mineral reservation, stated "it is irrelevant that gravel is not metalliferous and does not have a definite chemical composition. What is significant is that gravel can be taken from the soil and used for commercial purposes." 463 U.S. at 55. Thus, it is clear that BLM's statement correctly follows the Supreme Court's decision in Western Nuclear, Inc.

2/ Although, depending on the definition, cobbles may have been included in the gravel category, we conservatively assume that some of the cobble material was larger than gravel in size. Picture 1 in the BLM case file labeled "Sand and Gravel Material Removed from Pit Excavation," shows rocks that may be very substantial in size and therefore larger than gravel. It is impossible to discern the size of the rocks in the photograph because there is no frame of reference or scale.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Kathryn A. Lynn
Administrative Judge
Alternate Member

I concur:

Wm. Philip Horton
Chief Administrative Judge